Vol. I

no fold

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 254

PARAMOUNT PUBLIX CORPORATION,
PETITIONER,

vs.

AMERICAN TRI-ERGON CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 6, 1934.

CERTIORARI GRANTED NOVEMBER 5, 1934.

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United States District Court

EASTERN DISTRICT OF NEW YORK. 1

AMERICAN TRI-ERGON CORPORATION, Plaintiff, vs. PARAMOUNT PUBLIX CORPORATION, Defendant.	In Equity No. On U. S. Letters Patent No. 1,825,598.

Bill of Complaint 2

(Filed Nov. 19, 1931.)

AMERICAN TRI-ERGON CORPORATION, the plaintiff above-named, brings this its bill of complaint, against the above-named defendant and alleges as follows:

1. (a) That the plaintiff, American Tri-Ergon Corporation, is a corporation organized and existing under the laws of the State of New York and is a citizen and an inhabitant of said state, having a place of business in the Borough of Manhattan, County and State of New York. 3

(b) Upon information and belief, that the defendant, Paramount Publix Corporation, is a corporation organized and existing under the laws of the State of New York and is a citizen and an inhabitant of said state, having a regular and established place of business in Long Island City, County of Queens and State of New York and within the Eastern District of New York; and that upon information and belief, said defendant, prior to the commencement of this suit and subsequent to the grant of the Letters Patent referred to hereinafter, and as hereinafter stated, has committed at its said regular and estab-

lished place of business within the Eastern District of New York and elsewhere in the United States, acts of infringement upon the rights of plaintiff under said Letters Patent referred to hereinafter.

2. That the jurisdiction of the Court depends upon the patent laws of the United States.

3. (a) Upon information and belief, that heretofore and before the 29th day of March, 1922,
5 Hans Vogt, then a resident of Berlin-Wilmersdorff, Germany, Joseph Massolle, then a resident of Berlin-Grunewald, Germany, and Josef Engl, then a resident of Berlin-Grunewald, Germany, all then being citizens of Germany, were the true, original, first and joint inventors of new and useful improvements in processes for producing combined sound and picture films not known or used by others in this country before their invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before their invention or
6 discovery thereof, or more than two years prior to their application for Letters Patent hereinafter mentioned, and not in public use or on sale in this country for more than two years prior to their said application for Letters Patent, and not patented or caused to be patented by them or their legal representatives or assigns in any foreign country on an application for foreign patent filed more than twelve months prior to the filing of their said application in this country and which had not been abandoned.

(b) Upon information and belief, that on or about the 29th day of March, 1922, said Hans Vogt, Joseph Massolle and Josef Engl made due

application for the granting of United States Letters Patent for their said invention, in writing to the Commissioner of Patents, and filed in the Patent Office a written description of the same, and paid the fees required by law, and fully and in all respects complied with all the necessary conditions and requirements of the statutes of the United States in such cases made and provided.

(c) On information and belief, that on or about the 3rd day of June, 1924, said Hans Vogt, 8
Joseph Massolle and Josef Engl jointly executed and delivered an assignment to Tri-Ergon, Limited (otherwise known as Tri-Ergon, A. G.), a corporation organized and existing under the laws of Switzerland and having its principal place of business at Zurich, Switzerland, said assignment conveying to said Tri-Ergon, Limited (otherwise known as Tri-Ergon, A. G.) all right, title and interest in and to the said United States patent application and the invention thereof, and all United States Letters Patent to be issued upon or for the same; and authorizing and 9
requesting the Commissioner of Patents to issue any United States patent granted upon or for said invention, to said Tri-Ergon, Limited (otherwise known as Tri-Ergon, A. G.), such assignment being duly recorded in the United States Patent Office on or about the 23rd day of June, 1924, in Liber Z-121, page 309 of Transfers of Patents.

(d) That said Tri-Ergon, Limited (otherwise known as Tri-Ergon, A. G.) being the owner of said United States patent application and the invention thereof as aforesaid, by an agreement and assignment in writing, executed and de-

livered on or about the 4th day of September, 1928, and by a subsequent formal written assignment for recording, executed and delivered on or about the 15th day of February, 1929, and recorded in the United States Patent Office on or about April 17, 1929, in Liber X-138, page 240 of Transfers of Patents, sold, assigned and transferred to William Fox, of Woodsburgh, Nassau County, New York, all right title and interest in and to said United States application
11 and the invention thereof and United States Letters Patent to be granted therefor, subject to the terms and conditions of said agreement of September 4, 1928.

(e) That said William Fox, being the owner of said United States patent application and the invention thereof as aforesaid, by an assignment in writing, executed and delivered on or about the 6th day of June, 1930, and recorded in the United States Patent Office on or about July 3, 1930, in Liber T-144, page 192 of Transfers of Patents, sold, assigned and transferred unto
12 plaintiff, American Tri-Ergon Corporation, subject to the terms and conditions of said agreement of September 4, 1928, all of the right, title and interest in and to said United States patent application and the invention thereof, which had been assigned to him as aforesaid.

(f) Upon information and belief, that after the filing of said patent application, due examination having been made as to the novelty and utility of said invention, and all of the requirements of the statutes then in force having been complied with, Letters Patent of the United States, No. 1,825,598, were on the 29th day of September, 1931, issued in due form of law to the plaintiff,

American Tri-Ergon Corporation, in the name of the United States of America under the seal of the Patent Office and signed by the Commissioner of Patents or his duly authorized assistant, granting unto said plaintiff, its successors and assigns, for the term of seventeen years, the exclusive right to make, use and vend the said invention throughout the United States and the territories thereof. 13

(g) That the plaintiff, ever since the grant of said Letters Patent as aforesaid, has been and now is the owner of all rights in, to and under said Letters Patent and possessed of the entire right, title and interest in and to the same and to the inventions and improvements set forth therein, together with all rights of action, claims and demands arising thereunder, as by reference to said patent and to each and all of the aforesaid assignments and instruments or duly certifield or authenticated copies thereof ready in Court to be produced and of which profert hereby is made, will more fully appear. 14

4. Upon information and belief, that plaintiff's predecessors in title have put forth great effort and have expended substantial sums of money in the development of the processes described and covered by the aforesaid Letters Patent and in making the same useful to the public; that said predecessors in title have produced films in accordance with said processes and the exhibition of the same has caused said processes and the films made in accordance therewith to be favorably known throughout the world, and that the said invention is of great commercial value and utility and constitutes an important advance in the art. 15

16 *Bill of Complaint.*

5. That plaintiff is informed and believes, and therefore avers, that since the date of grant of the aforesaid Letters Patent, and prior to the commencement of the suit, defendant, Paramount Publix Corporation, has infringed and is now infringing upon the rights of plaintiff in, to and under said Letters Patent, by using, within the Eastern District of New York and elsewhere within the United States, the processes described and claimed in said Letters Patent, and by contributing to, instigating, participating in, directing, causing and or abetting the use of said processes within the Eastern District of New York and elsewhere within the United States; all without the license or permission of plaintiff or its predecessors in title, and in violation of plaintiff's exclusive rights under said Letters Patent, and that said defendant threatens to continue to infringe upon the rights of plaintiff under said Letters Patent, said defendant all the while intending and well knowing its acts to be an infringement of the rights of plaintiff under said Letters Patent; wherefore plaintiff has suffered and is suffering great and irreparable loss, damage and injury; and that plaintiff has been and still is being deprived of great gains and profits which it might and otherwise would have obtained, but which have been received and enjoyed and are being received and enjoyed by said defendant by reason of its aforesaid unlawful acts and doings, but to what extent and how much exactly plaintiff does not know and prays discovery thereof; all of which will continue unless further infringement by said defendant shall be enjoined.

17

18

6. (a) That the defendant has been duly notified of said Letters Patent No. 1,825,598 and of

its infringement thereof in violation of plaintiff's rights thereunder.

(b) On information and belief, that defendant has disregarded said notice and continued after said notice and threatens to continue to infringe upon plaintiff's rights under said Letters Patent.

(c) Upon information and belief, that the aforesaid acts and doings of said defendant, and its prepartion to continue the same in disregard and in defiance of plaintiff's rights, have the effect to, and do encourage and induce others to 20
infringe and continue to infringe upon the rights of plaintiff under said Letters Patent.

7. To the end, therefore, that plaintiff may have such relief as it is entitled to in the premises, it prays:

(a) That a process of subpoena issue out of and under the seal of this Court, requiring the defendant, Paramount Publix Corporation, to appear and make full, true, correct and perfect answer to the several matters and things set forth and charged in this bill of complaint (but not un- 21
der oath, an answer under oath being expressly waived).

(b) That the defendant, Paramount Publix Corporation, its officers, directors, servants, agents and all persons, firms and corporations associated with it or acting in its behalf, be perpetually enjoined and restrained by a decree of this Court, from directly or indirectly using or participating in the use of, contributing to, instigating or directing the use of or causing to be used, any and all methods and processes embodying or employing the invention of said Letters

22 *Bill of Complaint.*

Patent, and from infringing upon or contributing to the infringement of said Letters Patent in any manner whatsoever.

(c) That a preliminary injunction issue of like tenor and effect.

(d) That the defendant may be decreed to account for any pay over to plaintiff, all such gains, profits and advantages as have accrued to
23 or have been earned or received by said defendant and all such gains, profits and advantages as would have accrued to or been earned by the plaintiff but for said infringement by said defendant, and also all damages the plaintiff has sustained by said infringement.

(e) That the defendant may be decreed to pay the charges, costs and disbursements of this cause and that the plaintiff may have such other and further relief as the premises and the equity of the case may require and to the Court may seem meet.

24

AMERICAN TRI-ERGON CORPORATION,
By WARD, CROSBY & NEAL,
Solicitors for Plaintiff,
225 Broadway,
New York, N. Y.

Dated, New York, N. Y., November 19, 1931.

S. MORTIMER WARD, JR.,
PAGE S. HASELTON,
of Counsel,
225 Broadway,
New York, N. Y.

State of New York, }
County of New York, } *ss.:*

WILLIAM FOX, being duly sworn, deposes, and says, that he is a resident of Woodmere, Long Island, and is the President of American Tri-Ergon Corporation, the plaintiff named in the foregoing bill of complaint, that he has read said bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM FOX.

Sworn to and subscribed before me this
18th day of November, 1931.

DANIEL G. ROSENBLATT,
Notary Public, New York County,
New York County, Clk's. No. 450, Reg. No. 2R5A,
Kings County, Clk's. No. 247, Reg. No. 2434,
Bronx County, Clk's. No. 74, Reg. No. 3221B,
Term expires March 30th, 1932.

(Notarial Seal)

28

Answer.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

AMERICAN TRI-ERGON CORPORATION, Plaintiff, vs. PARAMOUNT PUBLIX CORPORATION, Defendant.	In Equity No. 5800 On Letters Patent No. 1,825,598.

29

The defendant, Paramount Publix Corporation, for answer to the Bill of Complaint herein, says:

1. With respect to paragraph 1, defendant is without knowledge as to the allegations of subdivision (a) thereof; defendant denies, upon information and belief, the allegations of subdivision (b), except that it admits that it is a corpo-
30 ration organized and existing under the laws of the State of New York, that it is a citizen and inhabitant of said State, and that it has a regular and established place of business in Long Island City, County of Queens and State of New York.

2. Defendant admits the allegation of paragraph 2.

3. With respect to paragraph 3, subdivisions (a) and (f), defendant admits that an application in the names of Hans Vogt, Joseph Massolle and Josef Engl was filed in the United States

Patent Office on March 29, 1922, and that on September 29, 1931, Letters Patent No. 1,825,598 were issued to American Tri-Ergon Corporation, but defendant denies, upon information and belief, each and every other allegation contained in subdivisions (a) to (g), inclusive, of said paragraph.

4. Defendant denies, upon information and belief, each and every allegation contained in paragraphs 4 and 5.

5. With respect to paragraph 6, subdivision (a), defendant admits that it received notice of alleged infringement of Letters Patent No. 1,825,-598 but defendant denies, upon information and belief, each and every other allegation contained in subdivisions (a) to (c), inclusive, of said paragraph.

6. Defendant alleges, upon information and belief, that said Letters Patent No. 1,825,598 are invalid and void, because the patentees named therein were not the original, first and joint inventors of the alleged improvements disclosed and claimed therein, and that the same in all their material and substantial respects were known and used by others in this country before the alleged invention or discovery thereof by the said patentees; were patented and described in printed publications in this and foreign countries before the alleged invention or discovery thereof by the said patentees, and more than two years prior to the application for patent of said patentees; were in public use and on sale in this

34 *Answer.*

country more than two years prior to the said application for patent; were described in United States applications for patent filed in the United States Patent Office prior to the alleged invention or discovery thereof by the said patentees; and were first patented or caused to be patented by the alleged inventors or their legal representatives or assigns in foreign countries upon applications filed more than twelve months prior to the filing of the application for said Letters
35 Patent No. 1,825,598.

(a) That the patents and printed publications above referred to, in so far as they have been ascertained are as follows:

UNITED STATES PATENTS.

Number	*Patentee*	*Date*
95,892	Fowx	Oct. 19, 1869
125,522	Bendann, *et al.*	Apr. 9, 1872
36 171,062	Swasey	Dec. 14, 1875
286,343	Stone	Oct. 9, 1883
606,993	Jenkins	July 5, 1898
824,813	Prentiss	July 3, 1906
970,199	Dyer, *et al.*	Sept. 13, 1910
983,801	Barr, *et al.*	Feb. 7, 1911
986,443	Clarke	Mar. 14, 1911
1,233,076	Lowenstein	July 10, 1917
1,252,965	Stocks	Jan. 8, 1918
1,254,684	Greensfelder	Jan. 29, 1918
1,260,337	Craig	Mar. 26, 1918
1,260,338	Craig	Mar. 26, 1918
1,279,099	Gilbert	Sept. 17, 1918

Number	*Patentee*	*Date*
1,320,760	Ives	Nov. 4, 1919
1,335,651	Bullis	Mar. 30, 1920
1,397,602	Owen	Nov. 22, 1921
1,446,246	De Forest	Feb. 20, 1923

FOREIGN PATENTS.

18,057	British	Haines	1906
6,727	British	Downing	1913
18,163	British	Kindermann	1913
115,942	British	Pedersen	1918

(b) That the instances of prior invention, knowledge, use and sale above referred to in so far as they have been ascertained are as follows:

By the patentees of the patents and by the authors of the publications in subdivision (a) above at the places therein stated and elsewhere in the United States.

(c) That the applications for patents above referred to, in so far as they have been ascertained as are follows:

The applications for Letters Patent of the United States listed in subdivision (a) above.

(d) That the above referred to foreign patents obtained by the alleged inventors or their legal representatives or assigns, in so far as they have been ascertained are as follows:

40 *Answer.*

French Patent No. 532,750 granted November 21, 1921, upon an application filed in France on March 25, 1921.

7. Defendant alleges, upon information and belief, that by reason of the proceedings in the United States Patent Office during the prosecution of the application which resulted in said Letters Patent No. 1,825,598 and the admissions and representations therein made by or in be-
41 half of the alleged inventors in order to induce the grant of the said Letters Patent, the plaintiff is estopped to claim for said Letters Patent a construction, were the same otherwise possible, as would cause said Letters Patent to cover or include any process used or caused to be used by the defendant.

8. Defendant alleges, upon information and belief, that said Letters Patent No. 1,825,598 are invalid and void because the alleged improvements described and claimed therein did not con-
42 stitute patentable subject-matter within the meaning of the Patent Laws, in view of the prior state of the art and what was common knowledge on the part of those skilled in the art; all prior to the date of the alleged invention thereof by the patentees named therein.

9. Defendant alleges, upon information and belief, that said Letters Patent No. 1,825,598 are invalid and void or cannot be given a valid interpretation which would bring any acts of the defendant within the scope thereof because the alleged invention described and claimed in said

Answer.

Letters Patent was not described or claimed in the original application as filed, upon which said Letters Patent were granted, but on the contrary constitutes new matter illegally and unjustifiably added to the said application subsequent to the filing thereof.

WHEREFORE, the defendant prays that the bill of complaint herein be dismissed with costs to the defendant.

PARAMOUNT PUBLIX CORPORATION,
By CHARLES NEAVE,
Counsel for Defendant.

CHARLES NEAVE,
Solicitor for Defendant.

Order Dated November 18, 1932, Amending Answer.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

	AMERICAN TRI-ERGON CORPORATION, Plaintiff, vs.	In Equity No. 5800.
47	PARAMOUNT PUBLIX CORPORATION, Defendant.	

It is, upon motion of the defendant and the annexed consent of the plaintiff, Ordered:

That defendant's answer be and the same is hereby amended to include in the lists of patents in paragraph 6 (a) thereof, United States Patents No. 1,186,717 to J. L. Walker, dated June
48 13, 1916, and No. 1,489,314 to Lee De Forest, dated April 8, 1924, and German Patent No. 279,-598 to Reimer, of 1914.

MARCUS B. CAMPBELL,
United States District Judge.

November 18, 1932.

Consented to:

S. MORTIMER WARD, JR.,
Counsel for Plaintiff.

Order Dated November 23, 1932, Amending Answer.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

AMERICAN TRI-ERGON CORPORATION, Plaintiff, vs. PARAMOUNT PUBLIX CORPORATION, Defendant.	In Equity No. 5800.

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It is, upon motion of the defendant and the annexed consent of the plaintiff, Ordered:

That defendant's answer be and the same is hereby amended to include in the lists of patent in paragraph 6 (a) thereof, United States Patent No. 1,286,383 to Oskar Messter, dated December 3, 1918.

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MARCUS B. CAMPBELL,
United States District Judge

November 23, 1932.

Consented to:
S. MORTIMER WARD, JR.,
Counsel for Plaintiff.

Narrative and Condensed Statement of the Testimony.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

AMERICAN TRI-ERGON CORPORATION,
Plaintiff,
vs.
PARAMOUNT PUBLIX
53 CORPORATION,
Defendant.

Before:

HON. MARCUS B. CAMPBELL,
U. S. D. J.

Brooklyn, N. Y., November 28, 1932.

APPEARANCES:

WARD, CROSBY & NEAL, ESQS., Solicitors for Plain-
54 tiff, by S. Mortimer Ward, Jr., Esq., and Page S. Haselton, Esq., of Counsel.

CHARLES NEAVE, ESQ., HENRY R. ASHTON, ESQ., E. J. DRISCOLL, ESQ., and F. T. WOODWARD, ESQ., Counsel for Defendant.

Mr. Ward: I offer in evidence a photostatic copy of the patent in suit to be marked Plaintiff's Exhibit 1.

(Marked Plaintiff's Exhibit 1 in evidence.)

Mr. Ward: I will state that we rely upon Claims 5, 6, 7, 8, 9 and 11.

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I offer in evidence certified copy of disclaimer with respect to Claims 6 and 7 of the patent in suit as Plaintiff's Exhibit 2.

(Marked Plaintiff's Exhibit 2 in evidence.)

Mr. Ward: I offer in evidence certified copy of File Wrapper and contents of the application for patent in suit as Plaintiff's Exhibit 3.

(Marked Plaintiff's Exhibit 3 in evidence.)

Mr. Ward: I offer in evidence certified copy of the decision of the Examiners of Interferences in Intereference No. 53,103, and of the decision of 56
the Board of Appeals, Patent Office, in the same case, to be marked Plaintiff's Exhibits 4 and 4-A.

(Marked Plaintiff's Exhibits 4 and 4-A in evidence.)

Mr. Neave: Are you offering the rest of that interference history?

Mr. Ward: No; we will just offer the decisions.

Mr. Neave: Then I object to the decisions without the rest, your Honor. It does not mean much unless we know what the procedure was on which the decisions were based. 57

The Court: I do not think that I can refuse to accept it, but so far as the weight of it is concerned, I suppose it would be quite limited. I would not understand what it was based on. Now, I am not urging you. It is up to you. You can well understand that I would not know much about it except what someone has said.

Mr. Ward: I do not care much, your Honor. It really is not very pertinent here. I simply want to show that we were awarded priority.

The Court: That, I suppose, they do not controvert.

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Mr. Ward: I would also like to place on the record that decision of the Court of Customs and Patent Appeals in that interference is to be found in 49 Fed., 2nd, page 1075.

I would like to offer in evidence copy of the DeForest patent involved in that interference, No. 1,489,314, as Plaintiff's Exhibit 5.

(Marked Plaintiff's Exhibit 5 in evidence.)

Mr. Ward: I offer in evidence photostatic copy of the original German application as filed, on
59 which the application for patent in suit is based on priority, being German application V16,431 V157, a2.

Mr. Ward: Together with a translation which, subject to correction, we have agreed upon.

(Marked Plaintiff's Exhibit 6 in evidence.)

Mr. Ward: I offer in evidence certified copy of assignment from Vogt, *et al.*, inventors of the patent in suit, to Tri-Ergon, Ltd., dated June 3, 1924.

(Marked Plaintiff's Exhibit 7 in evidence.)

Mr. Ward: I offer in evidence the photostatic
60 copy of agreement between Tri-Egron A. G. and William Fox, dated September 4, 1928, as Plaintiff's Exhibit 8.

(Marked Plaintiff's Exhibit 8 in evidence.)

I offer in evidence a photostat copy of the agreement between Tri-Ergon A. G. and Tri-Ergon Musik, dated November 8th and 15th, 1926, and a translation thereof.

(Marked Plaintiff's Exhibit 9 in evidence.)

Mr. Ward: I offer in evidence a certified copy of an assignment from Tri-Ergon A. G. to William Fox, including the patent in suit.

(Marked Plaintiff's Exhibit 10 in evidence.)

Mr. Ward: I offer in evidence a photostat copy of an assignment from William Fox to American Tri-Ergon Corporation, of certain patents, including the patent in suit. 61

(Marked Plaintiff's Exhibit 11 in evidence.)

Mr. Ward: I offer in evidence two combined statements and stipulations in the case, dated respectively November 17th and 26th, 1932.

(Marked Plaintiff's Exhibit 12 in evidence.)

I will also ask that these two papers be copied in the record. 62

[SAME TITLE]

"1. Defendant for the purposes of this suit, but only for such purposes, states that one or more of defendant's employees, if called as witnesses, would testify that the defendant has used in making sound motion pictures in the Eastern 63 District of New York, prior to the commencement of this suit and subsequent to the granting of the patent in suit, a process which includes the following: A series of scenes to be reproduced have been photographically recorded upon a film of negative stock to make a motion picture negative; a series of sounds accompanying the scenes, such for example as speech and music, have been photographically recorded upon a separate film of positive stock simultaneously with the recording of the scenes to make a sound negative; the exposed separate picture and sound films thus

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made have been developed separately by machine; the formula for the developer used in developing said sound negative is not identical with that used in developing said picture negative but is of the same character; the time of development in the two cases is different; a sample strip of sound negative thus made is attached hereto marked 'Exhibit 1 for identification' and is a fair example of the resulting product; a sample strip of motion picture negative thus
65 made is attached hereto marked 'Exhibit 2 for identification' and is a fair example of the resulting product; the picture and sound negatives thus made on separate films have been printed successively in proper spaced relation, upon the same surface of a positive film; this exposed positive film is then developed by machine; a sample strip of positive film thus made is attached hereto and marked 'Exhibit 3 for identification' and is a fair example of the resulting product. Defendant agrees that the foregoing statement may be used with the same force
66 and effect as if one or more of defendant's said employees had been called as a witness and duly testified thereto.

"Each of the parties reserves the right to offer additional evidence relating to the defendant's above process.

STIPULATION.

"It is hereby stipulated and agreed by and between counsel for the respective parties, for the purpose of this suit only.

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"2. That plaintiff, American Tri-Ergon Corporation, is a corporation of the State of New York, incorporated April 28, 1928, having a place of business in the Borough of Manhattan, County and State of New York.

"3. That printed or photostatic copies of United States and foreign patents may be introduced in evidence at the trial in lieu of the originals or certified copies thereof with the same force and effect as the originals duly proved, and 68
the dates appearing thereon shall be accepted as correct, subject to correction should error appear; and photostatic copies of printed publications may be introduced in evidence at the trial in lieu of originals thereof, with the same force and effect as originals thereof duly proved; and the dates of publication appearing thereon shall be accepted as correct, subject to correction should error appear.

"4. That plaintiff will rely upon claims 1 and 5 to 11, inclusive, of the patent in suit, claims 69
5, 7, 8 and 9 being designated as 'typical' claims.

"5. That the citizenship and residences of the patentees, Hans Vogt, Joseph Massolle and Josef Engl, are as pleaded in the bill of complaint herein.

"6. That so far as concerns the objection that copies are offered in lieu of originals, and subject to correction should error appear, defendant will not object to the admission in evidence of photostatic copies of the alleged assignments

and agreements referred to in paragraphs 3 (c), 3 (d) and 3 (e) of the bill of complaint, nor to copies of any such alleged assignments certified by the Commissioner of Patents as being true copies of assignments as recorded in the United States Patent Office, nor to a photostatic copy of a certain agreement between Tri-Ergon, A. G., of Zurich, Switzerland, and Tri-Ergon Musik, A. G., of St. Gall., Switzerland, dated November 8, 1926 and November 15, 1926, and such copies
71 shall have the same force and effect as the originals duly proven; but defendant reserves the right to object to their admission on any other ground or for any other reason.

"7. That subject to correction should error appear, a photostatic copy of a certified copy of German application of Vogt, Massolle and Engl, No. V 16431 VI/57a2, filed in the German Patent Office April 14, 1921, now on file in the United States Patent Office and certified by the German Patent Office, to be a true and exact
72 copy of the original papers of said German application, may be accepted in evidence with the same force and effect as the said original German application duly proven, including the date of filing, but defendant reserves the right to object to the admission of said photostatic copy on any ground that it might object to the duly proven original.

"8. That as to German application of Vogt, Massolle and Engl, filed in the German Patent Office on April 2, 1919, No. V. 14,634 IX/57 a 2, and referred to in French Patent No. 532,750,

set up in defendant's answer; a copy thereof certified by the German Patent Office as a correct and exact transcript of the original basic document of said application, may be accepted in evidence with the same force and effect as the said original German application duly proven, including the date of filing, but defendant reserves the right to object to the admission of said photostatic copy on any ground that it might object to the duly proven original.

"9. That subject to correction should error 74
appear, the copy of the file history of the above mentioned original German application of the said Vogt, Massolle and Engl No. V 16431 VI/57a2 which copy is certified by the German Patent Office, has attached thereto a United States consular certificate, and has been initialed by counsel for both parties to this suit, may be accepted in evidence with the same force and effect as the original of the said file history duly proved, but plaintiff reserves the right to object to the admission of the said certified copy on 75
any ground that it might object to the duly proved original.

"10. That Dr. Adolf Blatter, President of Tri-Ergon, A. G., if called as a witness on behalf of the plaintiff in this case, would testify that the corporation, variously referred to in one or more of the papers relating to the title to the patent in suit as 'Tri-Ergon Limited' and 'Tri-Ergon, A. G.,' is one and the same corporation, the name of which is Tri-Ergon A. G., and that this stipulation shall be given the same force

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and effect as if the said Adolf Blatter were called as a witness and testified as above stated.

"11. That as at present advised, defendant will rely at the trial upon the following prior patents as anticipations of the alleged invention of the patent in suit:

UNITED STATES PATENTS.

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606,993	Jenkins	July 5, 1898
1,186,717	Walker	June 13, 1916
1,252,965	Stocks	Jan. 8, 1918
1,254,684	Greensfelder	Jan. 29. 1918
1,260,337	Craig	Mar. 26, 1918
1,260,338	Craig	Mar. 26, 1918
1,335,651	Bullis	Mar. 20, 1920
1,489,314	DeForest	Apr. 8, 1924

BRITISH PATENTS.

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18,163	Kindermann	1913
115,942	Pedersen	1918

GERMAN PATENTS.

279,598	Reimer	1914

"12. That plaintiff will consent to an order amending defendant's answer to include in the lists of patents in paragraph 6 (a) thereof, United States Patents No. 1,186,717 to J. L. Walker, dated June 13, 1916, and No. 1,489,314

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to Lee De Forest, dated April 8, 1924, and German patent No. 279,598 to Reimer, of 1914.

"13. That this suit is being openly defended by Electrical Research Products, Inc., a wholly owned subsidiary of Western Electric Co., Inc.

(Signed) S. MORTIMER WARD, JR.,
Counsel for Plaintiff.

" HENRY R. ASHTON,
Counsel for Defendant.

Dated: New York, N. Y.,
November 17, 1932."

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[SAME TITLE]

"1. Defendant for the purposes of this suit but only for such purposes, states that one or more of defendant's employes, if called as witnesses, would testify that the process which the defendant has used in the making of sound motion pictures in the Eastern District of New York, prior to the commencement of this suit and subsequent to the granting of the patent in suit, includes the following:

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"2. The developer formula used for developing the picture negative is as follows:

Elon	—2.75 lbs.
Sodium Sulphite	—420 lbs.
Hydrochinon	—2.75 lbs.
Borax	— 1 lb., 3 oz.
Water to make	—600 gals.

"3. The developer formula for developing the sound negative is as follows:

Elon	—14 lbs.
Sodium Sulphite	—498 lbs.
Hydrochinon	—32 lbs.
Borax	—21 lbs.
Boric acid	—73.5 lbs.
Water to make	—600 gals.

83 "4. In developing the picture negative by machine, the various scenes taken during the day, including those photographed in the studio by artificial light and those photographed outside the studio by daylight, are run through the developing machine as one continuous film and all receive the same development.

"Each day before development is begun, a short piece of film, known as a sensitometer strip is run through and developed by the machine. The contrast to which this strip has been developed is then determined. If the contrast is
84 either greater or less than the standard contrast given by the defendant to all its picture negatives, the time of development is changed between the limits of 9 and 12 minutes, by adjusting the speed of film travel through the machine.

"The developing solution is maintained at a constant strength at all times. This is accomplished by adding fresh developer at a predetermined uniform rate. The developer is maintained at all times at 65° Fahrenheit.

"5. In developing the sound negative by machine, the various sound recordings, made during the day, are run through the developing machine

as one continuous film and all receive the same development. 85

"Each day before development is begun a sensitometer strip is run through and developed by the machine. The contrast to which this strip has been developed is then determined. If the contrast is either greater or less than the standard contrast given by the defendant to all its sound negatives, the time of development is changed between the limits of 4 and 5 minutes, by adjusting the speed of film travel through the machine. 86

"The developing solution is maintained at a constant strength at all times. This is accomplished by adding fresh developer at a predetermined uniform rate. The developer is maintained at all times at 65° Fahrenheit.

"One or more pictures produced by the defendant, contained one or more outdoor scenes which were photographed by daylight in addition to studio scenes photographed by artificial light.

"7. The time of development of the picture negative is between 9 and 12 minutes and the time of development of the sound negative is between 4 and 5 minutes. 87

"8. The over-all gamma of the picture record is substantially 1.2 and the over-all gamma of the sound record is substantially 1.0.

"9. In recording the sound, the source of light is a lamp which is operated at constant intensity. The amount of light from this lamp which reaches the film is varied by a device known as

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the Light-Valve in accordance with the sound waves being recorded.

"10. Each of the parties reserves the right to offer additional evidence relating to the defendant's above process.

(Signed) HENRY R. ASHTON,
Counsel for Defendant.

Dated: New York, N. Y.,
89 November 26, 1932."

Mr. Ward: Accompanying that first statement of defendant's in Exhibit 12 there are some strips of film which I offer in evidence as Plaintiff's Exhibit 12-A. Those strips of film are referred to in the first paper of Exhibit 12 as Exhibits 1, 2 and 3 for identification.

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LOUIS B. HOFFMANN, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination by Mr. Ward:

My name is Louis B. Hoffmann; 35 years of age; I reside in Rye, New York; and I am at present employed by Mr. John Joy, who is Technical Adviser to the American Tri-Ergon Corportion.

Louis B. Hoffmann—For Plaintiff—Direct. 91

I have been connected with the sound motion picture business since April of 1925, when I was employed by the DeForest Phono-film Corporation as chief recording engineer and laboratory assistant to Dr. Lee DeForest of the corporation, until 1928, at which time I was employed by the Fox Film Corporation as Technical Director of the Fox Movietone News, and later as Assistant to the Director of Research and Development Division of the Fox Corporation.

I am in general familiar with the formula 92
which the defendant supplied to the plaintiff. I have a copy of that formula. I have conducted work with a view of determining the differences or difference in the action of those formulas on film. I mixed two chemical baths which are identical with the ones used by the defendant. I did not want to mix 600 gallons of developer, so I reduced the various amounts of chemicals that were stipulated in proportion to one gallon of developer of each kind, one of the sound bath and one of the picture bath—I made a photograph on motion picture film— 93

Q8. That is to say, you took this formula, and by reducing the quantities of it, you mixed up a quantity of the formula for the sound developer and then you mixed up a quantity in reduced quantities of the developer for the picture film, as given by the defendant? A. Yes, that is correct.

The Court: Made a gallon of each?
The Witness: Made a gallon of each.

Q9. Have you got the figures with you that you used in reducing those proportions? A. I have

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here the exact weights of each chemical as used in the particular baths which I mixed, showing the amounts of each chemical. Do you wish me to read these?

Q10. After you reduced these proportions down, as you state, did you have precisely the same percentage of the different ingredients in each formula, as called for by the formula? A. Yes, I did.

95 The Court: What did you do? Did you divide each of them by 600?

The Witness: That is it, substantially what I did.

Q11. You said that you had the sound developer in one tank or container, and the picture developer in the other. A. I made a photograph on the usual negative film employed in the motion picture industry, and from a strip of that 10 feet long, I tore it in two, and developed one-half of the negative in one batch of developer, namely, the sound developer, and the other half
96 in the picture developer. These two pieces of film were on the same emulsion, they were developed the same time, the same length of time in their respective baths at the same temperature. At the same time with these two pieces of film were developed—

Q12. How did you know that the temperature of the two baths was the same, the two developers? A. Because the two tanks in which were the two separate developers were surrounded by uniformly tempered water, so that the temperature of the developer was the same as the temperature of the water surrounding both baths,

and the developing tanks were immersed for a long enough time so that the temperature of the developer had become equalized with the temperature of the water surrounding the tanks. The temperature in the two tanks was 65 degrees Fahrenheit. I measured it with a thermometer. The tanks that I had these two developers in were hard rubber tanks.

Q16. Now, you got to the point where you stated that you had taken about a ten-foot length of motion picture film or picture on a motion picture machine. Was that whole 10 feet taken at the same time or at some different time? A. The whole 10 feet were taken at the same time.

Q17. Just in one shot? A. That is right. As a matter of fact, it was a 10-foot section of a section about 30 feet long that was all exposed at the same time; after I took that picture, I tore about a 10-foot strip off and divided that in half and then developed one-half in one of these tanks and one-half in the other. I developed those pictures in those tanks of developer in this way. Each one of these two separate pieces of negative were wound on a core, a reel such as is used in developing a film, short pieces of film. The reel itself was then immersed in the liquid and at regular intervals of one minute, each core was raised and lowered the same number of times in each bath. So I had the same temperature in each of the developers and developed each the same length of time.

Q21. And you had the same agitation or handling of the two pieces of film one in each tank? A. Yes, there was the same agitation of the core in each tank because I had one core in one hand and one core in the other hand, and the reel

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itself was not lifted out of the developer during that process. I gave each of the pieces of film exactly the same treatment, except for the differences, if there were differences, in the two developers.

Q23. Now, you started to say that at the same time you developed the two negatives in that way, you developed some strips. Will you go ahead and explain that? A. I developed two strips, one with each negative strip. These strips
101 were uniformly exposed on the same original negative emulsion, unexposed emulsion, in the manner in which it is done in the motion picture industry, for determining the degree of development of a piece of film, a strip called a sensitometer strip, which were exposed in the latest type Eastman sensitometer called the type 2B, and the exposures were made at the Eastman Kodak place in New York here, with the proper illumination for the negative film that I was using. These strips, as I say, were then—one was developed with one picture negative and the
102 other with the opposite picture negative—

24. That is, you took one of these testing strips and you put it in one tank with one of these films, picture films, and you took the other and put it in the other tank with the other picture film? A. That is correct. They were developed the same time and at the same temperature as the picture negatives were.

I did all of this developing and handling work myself.

The extent to which the development had been carried on, the degree of development in each of these baths, can be measured by measuring the capacity or the density of the exposures which

have been made with this device called the sensitometer. By plotting the densities read on a device called the densitometer, density meter, by plotting the absolute measurements gotten from that device on a curve sheet, which has as one axis the logarithm of the exposure, and the density as the other axis, it is possible to determine by the slope of the straight line section of that curve the degree of development or at least use that as a measure of the degree of development of the film. That is a practice which 104
is commonly used in the motion picture industry for determining the degree of development of the film. I have plotted those curves, and they form part of this exhibit—

Q28. Both with respect to the picture negatives and these strips which you developed, what did you do with respect to them, in the way of washing or drying, and so forth? A. After development was completed of these two strips, and they were developed exactly the same length of time, they were immersed in the hypo solution, which is commonly used for fixing out the unexposed silver salts, and after that operation was 105
completed, they were thoroughly washed in order to remove any of the existing chemicals that may still be in the film, and the film dried.

Q29. Were those treatments the same or different with respect to the strip and the film that you had in the sound developer and with respect to the strip and picture film that you had in the picture developer? A. Those treatments were identical. They were immersed in the same solution of hypo and the same solution of water.

This is again a curve in which I have plotted the densities and shows the different degree of

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development which is obtained in the defendant's picture developer as against the degree of development obtained in the defendant's sound developer. On this chart I have the curve B marked, using defendant's sound developer. And then the lower curve marked A is the curve using the picture developer.

Q33. From what data did you plot these curves? A. I have here a laboratory sheet on which I recorded the measurements as I actually
107 made them.

Q34. Where did you get those readings from that are here on this chart or sheet? A. They were the readings given by a device called the densitometer, which is substantially a photometric device for measuring the darkness of a piece of exposed film.

Q35. What is it you tested in the densitometer to get these readings? A. I tested these sensitometric strips which are marked A and B, respectively. That is, the readings that appear on this sheet are the readings taken from the strips that
108 I developed in these two tanks. I took these readings personally. I plotted the curves. I did all this work personally.

Q41. Will you please take the other chart, the other curve sheet you have in your hand, and explain that before I offer it in evidence? A. In order to plot the density values read on the densitometer to a scale of opacity, in other words, the degree of darkness, I placed these curves here and marked them respectively A and B. I am referring now to the curve shown on the sheet marked opacity.

Mr. Ward: I offer a photostat copy of the densitometer readings shown on the

sheet entitled, "Density readings of sensitometer strips", referred to by the witness Hoffmann. 109

(Marked Plaintiff's Exhibit 13 in evidence.)

Mr. Ward: I offer in evidence a photostat copy of the gamma curve referred to by the witness Hoffmann.

(Marked Plaintiff's Exhibit 14 in evidence.)

Mr. Ward: I offer a photostat copy of the opacity curve referred to by the witness Hoffmann. 110

(Marked Plaintiff's Exhibit 15 in evidence.)

The Witness: I have here a paper which is the work sheet from which I figured out the reduced quantities of ingredients for the two developers which I referred to. And these reduced quantities shown on the sheet are the actual quantities that I used.

Mr. Ward: I offer the work sheet in evidence. 111

(Marked Plaintiff's Exhibit 16 in evidence.)

Q46. Mr. Hauffmann, with regard to the picture strips which you developed, have you any part of those strips there, and if so, please state what they are? A. Yes, I have a part of each one of the five-foot strips that were developed in accordance with my testimony. This strip marked A was developed in the defendant's picture developer and the one marked B was developed in the sound developer.

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Mr. Ward: I offer in evidence the picture strip referred to by the witness as being developed in the defendant's picture developer.

(Marked Plaintiff's Exhibit 17 in evidence.)

Mr. Ward: And I offer in evidence the piece of negative referred to by the witness Hoffmann as developed in the defendant's sound developer.

113 (Marked Plaintiff's Exhibit 18 in evidence.)

Q49. Referring to the two pieces of picture negative, Plaintiff's Exhibits 17 and 18; will you please state what position they bore with respect to each other on the piece of negative film that you testified you developed? A. These two pieces were photographed directly adjacent to each other. By examining the two pieces, you can see where the two were torn and the separation mark identifies them. That is to say the tearing of the
114 two pieces shows where they match one on the other. Then, after tearing them in this manner, I developed them separately in the two developers, as I have stated.

Q52. Now, did you print any pictures from any parts of these two negative strips, 17 and 18? A. Yes, that photograph which you have in your hand is a paper print made of two frames of pictures, one from each of these two pieces of film that are marked Exhibits 17 and 18. That is, one of those pictures was made from one frame on one of those exhibits, Exhibit 17, and the other picture was made from another frame, on Exhibit 18.

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Q54. Can you state how far apart those two frames were from each other on that strip of film? A. They were seven frames apart on the original film, which means a time difference of about a quarter of a second or thereabouts.

Q55. What are the frames that you used in printing those pictures? A. They are the two frames that are on the end of the straight cut portion. That is, they are taken respectively from the last frame on Exhibit 17 and the last frame on Exhibit 18.

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The lower picture was printed from the negative developed in the sound developer bath and the picture at the top was printed from the negative developed in the picture developer bath. The lower one was printed from Exhibit 18, the upper one was printed from Exhibit 17.

Mr. Ward: I offer the two pictures on one sheet referred to by the witness as Plaintiff's Exhibit 19.

(Marked Plaintiff's Exhibit 19 in evidence.)

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These photographs were made in the Seidman Photographic Laboratory. I was a witness to the photographing of them.

I saw the photographing made, under my supervision.

Q62. Will you please state how they were made from those two negatives? A. These two negatives were placed between two pieces of clear glass to flatten them out, and also to get the two pictures from the respective exhibits adjacent to each other. Light was projected through those two frames and printed on to that piece of paper, which has been offered in evidence.

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Q63. Will you explain just what the difference is in those two pictures with respect to the developer or development? A. In the photographic art, one would be considered a normal or a soft picture, and the other one would be called a contrasting picture, one in which the highlights and shadows have been distorted beyond their natural shades.

Q64. Which is the better picture from the standpoint of a motion picture? A. From an ex-
119 amination of this print, I would say that the one that was developed in the picture bath. The upper one. And the lower one is the one that I refer to as being light or harsh.

The Court: The lines are more sharply defined in the lower one?

The Witness: There are, however, details which are missing in the lower picture.

The Court: I say the lines are not sharply defined?

The Witness: Yes.

120 The Court: They do not smooth off?

The Witness: That is correct.

Q67. You will find the details more properly brought out in the upper one, you say? A. Yes. For example, the texture of the sweater is quite distinct in the upper photograph, whereas it is missing in the lower one.

Q68. To what do you attribute the difference in the quality or character of those two pictures? A. Because of the difference in the development of the original negatives. That is, the difference in the developer that was used in the two negatives.

Q70. Have you examined the two negatives from which these two pictures respectively were taken, to see whether you could see the same contrast there? A. You can't see the same contrast but anyone experienced in the art can immediately determine that one negative is much harsher than the other.

Q71. Which is the harsh one? A. The one that was developed in the sound developer bath.

Q72. Now, you described the method in which, the procedure which you followed, or was followed under your supervision, to take these two pic- 122
tures in these two negative frames. Under that procedure were the light conditions different for the two pictures, or the same? A. No, they were identical. One source of illumination was used to enlarge these two small photographs on the same paper. That is part of the same light source went through one frame, and part through the other.

Q74. With regard to the results shown by these curves, I am handing you Plaintiff's Exhibit 15, the opacity curves, will you please point out wherein these curves show a different or similar 123
contrast shown by these two pictures that you testified about? A. Exhibit 15 shows at the right-hand side of the chart, the wide difference in the opacity of the film strip developed in the sound developer B, and the one in developer A. That means that the high lights of the original subject are modified, or the differences between these two are magnified in developing in the separate solutions. It also means that there is much less detail in the high lights. That is, the curve B on that exhibit corresponds to the lower picture of Exhibit 19. And the lower curve A corresponds to the upper picture on Exhibit 19.

124 *Louis B. Hoffmann—For Plaintiff—Direct.*

Q77. Then you find the same results in both of these tests that you have carried out, the one of the photograph obtained, and the curves from the densitometer sheets? A. Yes, these test strips bear out the effect that we noticed in the pictures that were printed from the negatives.

Q78. This method of using these test strips to test out developer solutions: is that something of your own idea, or is that something that is used in the industry right along for that purpose? A. No, it is a well known process used in the art
125 every day, for determining the extent to which the development has been carried out.

Q79. You have referred in your testimony to these test strips that you developed along with the two picture negatives, Exhibits 17 and 18.

Q80. Have you got those strips? A. Yes, I have them.

Q81. Will you please tell the Court which is which? A. This strip was developed with the picture negative developed in the sound developer bath.

Q82. Exhibit 18 was of the sound developer
126 bath? A. This was developed along with Exhibit 18.

Q83. And that is the strip from which you took the readings on Exhibit 13, the readings marked sound developer? A. That is correct.

Mr. Ward: I offer the strip of test film referred to by the witness in evidence.

(Marked Plaintiff's Exhibit 20 in evidence.)

Q84. The other strip that you have there, that is the strip developed with which picture nega-

tive? A. With the picture negative, marked Exhibit 17.

Q85. And is that the strip from which you got the data shown on Exhibit 13, marked picture developer? A. That is correct.

Mr. Ward: I offer the strip last referred to by the witness as developed by the defendant's picture developer in evidence.

(Marked Plaintiff's Exhibit 21 in evidence.)

Cross Examination by Mr. Neave: 128

I am at present employed by Mr. Joy who is technical adviser of the American Tri-Ergon Company. I am with the American Tri-Ergon Company, and have been since approximately the middle of July of this year. Prior to that time, I was with the Fox Film Corporation. —Since 1928.

Before that time, I had something to do with these talking moving pictures, since April, 1925, to April, 1928, I was with the DeForest Phonofilm Corporation. And before 1925, I was with 129 the American Telephone and Telegraph Company.

As to the class of my duties from the time I was with the DeForest Company in 1925, I was in the technical end, in the photographing.

I had to do with the process of recording sound on films, quite a bit to do with the experimental work that was being carried on by Dr. DeForest at that time, toward improving the phonofilm.

I took talking movies myself, from 1925 on to 1928.

XQ99. Did you develop talking movies? A. Beg pardon?